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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ARNULFO VASQUEZ, Plaintiffs and Appellant, v. JUAN JOSE INTERIANO, et al., Defendant and Respondent.	B202120 (Los Angeles County Super. Ct. No. PC038508)

APPEAL from a judgment of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Affirmed in part and reversed in part.

Peter T. Brown and Associates and Peter T. Brown, for Plaintiff and Appellant Arnulfo Vasquez.

Law Offices of Sef Krell and Sef Krell for Defendant and Appellant Juan Jose Interiano.

Law Office of Priscilla Slocum, Priscilla Slocum; Vail & Stub and Russell D. Boeddingaus for Defendant and Respondent Mya Borgman.

INTRODUCTION

Mya Borgman requested Juan Jose Interiano, her landscaper, to trim some palm trees in her yard. Interiano hired Arnulfo Vasquez to trim the trees. Vasquez lacked the required license to trim trees of the height involved. Vasquez fell from one of the trees and brought a negligence action against Interiano for injuries he sustained in the fall. Vasquez subsequently amended his complaint to add Borgman as a doe defendant. Interiano filed a cross-complaint against Borgman asserting causes of action for complete equitable indemnity, partial equitable indemnity, contribution and equitable apportionment, declaratory relief, and breach of contract. The trial court granted Borgman's motion for summary judgment as to Vasquez's complaint and Interiano's cross-complaint and Vasquez and Interiano appeal. We affirm the summary judgment as to Vasquez's complaint and reverse the summary judgment as to Interiano's cross-complaint.

BACKGROUND

Interiano was the landscaper for Borgman's property. Interiano had been a landscaper for 18 years. Borgman asked Interiano to trim her palm trees. Interiano quoted Borgman a price of $50 or $75 per tree to trim the trees and Borgman hired him to trim four or five palm trees.[1] Interiano told Borgman that he would get someone to do the work.

Interiano hired Vasquez to trim the trees on Borgman's property. Vazquez had been trimming trees for three to four years, but did not have any license to trim trees. Interiano took Vasquez to the property and told him which trees to trim. Interiano did not

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[1] Although Interiano testified at his deposition that he did not know whether a license was required to trim trees, there is no evidence in the record that addresses whether Interiano possessed the required license.

introduce Vazquez to Borgman. Borgman did not speak with Vasquez about trimming the trees.

Vasquez began by climbing and trimming a palm tree that was about 60 or 70 feet tall. Vasquez used only his own equipment that day; he did not use any equipment from "the house." When Vazquez finished trimming the first tree, he tied his rope to one of the palm tree's fronds and tried to swing to another tree. The palm frond broke and Vasquez fell about 12 to 13 feet to the ground. According to Vasquez, he did "everything" the way he had been taught, all of his equipment worked correctly, and he "just happened to pick the wrong frond." Vasquez believed that the frond was strong enough to hold him. If he could "do it again," he would have picked a different frond.

A contractor's license is required to trim trees that measure 15 feet or more. (Bus. & Prof. Code, § 7026.1, subd. (d); *Fernandez v. Lawson* (2003) 31 Cal.4th 31, 34.) There is a rebuttable presumption that an unlicensed worker performing work for which a license is required is an employee rather than an independent contractor. (Lab. Code, § 2750.5.) Under Labor Code section 3352, subdivision (h), an employee who has worked less than 52 hours for an employer is excluded as an employee for workers' compensation purposes. (*Cedillo v. Workers' Comp. Appeals Bd.* (2003) 106 Cal.App.4th 227, 234.)

Vasquez allegedly was injured while trimming a tree, without a license, that measured more than 15 feet. Vasquez had been on the job at Borgman's property less than 52 hours when he allegedly was injured. Accordingly, Vasquez argues, he was not an independent contractor but Borgman's employee who was excluded from the workers' compensation system and thus freed to bring a negligence action against Borgman. As we discuss, we need not decide the issue related to whether Vasquez was an employee of Borgman or Interiano or both because, as we explain below, even if he was an employee, the evidence before the trial court demonstrates that Borgman was not negligent, and Borgman has not made out a prima facie case sufficient to support her summary judgment motion as to Interiano's cross-complaint.

At Vazquez's deposition, Borgman's attorney asked Vasquez, "Do you think the owner of the property—the conduct of the owner of the property—did the conduct of the owner of the property do anything to contribute to this accident occurring?" Vasquez responded, "No." Vasquez further testified that there was nothing about the job that he felt was dangerous and nothing about the property that he felt created a dangerous condition for him. Vasquez also testified that he did not believe that Interiano did anything that caused him to fall.

DISCUSSION

I. Standard of Review

"We review the grant of summary judgment de novo. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19 [17 Cal.Rptr.2d 356].) We make 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222 [38 Cal.Rptr.2d 35].) A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, 853 [107 Cal.Rptr.2d 841, 24 P.3d 493].)" (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1216-1217; *Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 894 ["A defendant 'moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact'"].)

II. The Trial Court Properly Granted Borgman's Summary Judgment Motion As To Vasquez's Negligence Action

Vasquez contends that the trial court erred in granting Borgman's summary judgment motion as to his negligence action. We disagree.

The elements of a negligence cause of action are a legal duty to use due care, a breach of that duty, and the breach is the proximate or legal cause of the resulting injury. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) The evidence adduced in connection with Borgman's summary judgment motion demonstrates that Borgman did not breach any duty owed to Vasquez.

Vasquez, in his negligence action, alleges that on April 3, 2004, while Vasquez was in the course and scope of his employment with Interiano, Interiano and the doe defendants "carelessly directed plaintiff to climb trees on defendant's property in, without proper equipment and manpower for such a task, thereby causing, when Plaintiff Vasquez fell, severe injuries including, but not limited, to plaintiff's back." Vasquez further alleges that Interiano and the doe defendants "negligently and in violation of statute, carelessly failed to provide plaintiff VASQUEZ with a safe workplace."

At his deposition, Vasquez testified that Borgman did not do anything to "contribute to this accident occurring." Vasquez also testified that he did not believe that there was anything dangerous about the job or anything about the property that created a dangerous condition for him. Vasquez admitted that he fell because he tied his rope to the wrong palm frond. Such evidence demonstrates that Borgman did not breach any duty owed to Vasquez. "'Where, as here, however, there is a clear and unequivocal admission by the plaintiff, himself, in his deposition . . . we are forced to conclude there is no *substantial* evidence of the existence of a triable issue of fact.' [Citation.]" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.) There is nothing in the record that undercuts Vasquez's admissions.

III. Borgman Failed To Demonstrate A Prima Facie Showing Entitling Her To Summary Judgment As To Interiano's Cross-Complaint

Interiano contends that the trial court erred in granting Borgman's summary judgment motion as to his cross-complaint. We agree.

Interiano, in his cross-complaint, asserts causes of action for complete equitable indemnity, partial equitable indemnity, contribution and equitable apportionment, declaratory relief, and breach of contract. The notice for Borgman's summary judgment motion states that the grounds for the motion are that "this Defendant did not owe Plaintiff a duty as a matter of law, nor did this Defendant breach any duty owed to the Plaintiff (if any), nor was any breach of an alleged duty the cause of the Plaintiff's injuries. Further, Plaintiff's claim is barred by the doctrine of primary assumption of risk." The notice does not identify any grounds for summary judgment with respect to Interiano's cross-complaint. Borgman apparently relies primarily on the argument that she owed no duty to Vasquez or Interiano.

In the substantive part of Borgman's summary judgment motion, Borgman focuses almost exclusively on arguments addressed to Vasquez's complaint and not to Interiano's cross-complaint. Borgman argues that she was added to the complaint as a doe defendant, and there are no substantive allegations against her in the complaint; she did not owe a duty to Vazquez or Interiano to provide a safe place to work under the Labor Code or the California Occupational Safety and Health Act of 1973; she was not negligent; and the primary assumption of risk doctrine barred Vasquez's "incident." Borgman does not explain how these asserted defenses to Vasquez's negligence action also apply to any of the causes of action alleged in Interiano's cross-complaint.

Of the five causes of action Interiano asserts in his cross-complaint (complete equitable indemnity, partial equitable indemnity, contribution and equitable apportionment, declaratory relief, and breach of contract), Borgman's summary judgment motion addresses only the breach of contract cause of action. Borgman argues, "In the 5th Cause of Action in the Cross-Complaint ['EXHIBIT 'D'] for something called 'Breach of Contract', Cross-Complainant JUAN JOSE makes several frivolous

assertions, including that Cross-Defendant BORGMAN allegedly failed to control the work of cross-complainant, failed to direct the work of cross-complainant, failed to approved and/or inspect the work of the cross-complainant, etc. [¶] At no time in the Cross-Complaint does Cross-Complainant allege any facts establishing that Cross-Defendant BORGMAN owed any duty to supervise the work of the Cross-Complainant or direct his work [or how this had anything to do with this case]. [¶] Cross-Complainant conceded that he was in the tree trimming business for 18 years [EXHIBIT 'B', depo. INTERIANO, 15:22-25]. Nor does JUAN JOSE provide any 'contract' – he testified that MYA BORGMAN did nothing more than ask him to cut some branches of palm trees [EXHIBIT 'B', INTERIANO depo., 18:3-25]. [¶] As INTERIANO testified, all Ms. BORGMAN said was that she wanted some palm trees trimmed, and that was the entire scope of the request [EXHIBIT 'B', INTERIANO depo., 22:18-25, 23:1]"

In his cross-complaint, Interiano alleges a contract between Borgman and Interiano pursuant to which Borgman was to coordinate and direct the work Interiano was to perform. So far as is reflected in the evidence submitted in support of and in opposition to Borgman's motion for summary judgment, Borgman's attorney did not ask Interiano questions at his deposition that addressed the terms or existence of the contract as alleged in the cross-complaint.

As support for Borgman's apparent argument that there was no contract because she "did nothing more than ask [Interiano] to cut some branches of palm trees," Borgman cites the following testimony from Interiano's deposition:

"Q How is it that you came about needing a tree trimmer for that home?

"A The Misses asked me if I would cut the branches."

Such testimony does not support Borgman's argument. Although somewhat unclear, the exchange appears to address the issue of how Interiano came to learn that Borgman desired to have her palm trees trimmed. The inquiry plainly did not ask Interiano to set forth all of the terms of his agreement with Borgman to trim her palm trees.

Next, citing lines 18 through 25 on page 22 and line 1 on page 23 of Interiano's deposition transcript, Borgman asserts that Interiano testified that the "entire scope" of

Borgman's request was her statement that she wanted some palm trees trimmed. The cited testimony on page 22 is as follows:

"Q And so rather than asking for the trees to be trimmed, did Mya Borgman ask for any other specific things to be done to the trees?

"A No. Just the palm trees.

"Q In other words, she said she wanted the palm trees trimmed?

"A Yes.

"Q That was the entire scope of the request?"

Page 23 of Interiano's deposition transcript, which apparently provided the answer to the question at the bottom of page 22, was not attached to Borgman's summary judgment motion. Even assuming that Interiano answered the question about the scope of Borgman's request affirmatively, the question was directed only to what Borgman wanted done to her palm trees. That is, the "entire scope" of what Borgman wanted done to her palm trees was that she wanted them trimmed. The question did not seek a list of all of the terms of Interiano's alleged contract with Borgman.

As stated, Borgman had the initial burden of demonstrating a prima facie showing that there are no triable issues of fact as to the causes of action in Interiano's cross-complaint. (*Mills v. U.S. Bank, supra,* 166 Cal.App.4th at p. 894; *Moser v. Ratinoff, supra,* 105 Cal.App.4th at pp. 1216-1217.) Because Borgman did not address at all four of Interiano's five causes of action and failed to show the absence of a triable issue of fact as to Interiano's fifth cause of action for breach of contract, Borgman failed to meet this burden. Accordingly, the trial court erred in granting summary judgment to Borgman as to Interiano's cross-complaint.

DISPOSITION

The summary judgment as to Vasquez's complaint is affirmed. The summary judgment as to Interiano's cross-complaint is reversed. Borgman is awarded her costs on appeal as to the Vasquez complaint. Interiano is awarded his costs on appeal as to his cross-complaint.

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MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.